

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

3 GREGORY SURGICAL SERVICES,
4 LLC,
5 Plaintiff, . Case No. 06-cv-00462
6 vs. . Newark, New Jersey
7 HORIZON BLUE CROSS BLUE . February 8, 2011
8 SHIELD OF NEW JERSEY, INC.,
9 Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MADELINE COX ARLEO
UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

For the Class
Plaintiffs:

BRUCE HELLER NAGEL, ESQ.
Nagel Rice, LLP
103 Eisenhower Parkway
Suite 201
Roseland, NJ 07068
(973) 618-0400
Email: Bnagel@nagelrice.com

NEIL L. PRUPIS, ESQ.
Lampf, Lipkind, Prupis & Petigrow
80 Main Street
West Orange, NJ 07052
(973) 325-2100
Email: Prupis@llpplaw.com

CHARLES XAVIER GORMALLY, ESQ.
Brach Eichler, L.L.C.
101 Eisenhower Parkway
Roseland, NJ 07068
(973) 228-5700
Email: Cgormally@bracheichler.com

1 For the Defendant: B. JOHN PENDLETON, JR., ESQ.
2 DLA Piper LLP (US)
3 300 Campus Drive
4 Suite 100
5 Florham Park, NJ 07932
6 (973) 520-2561
7 Email: John.Pendleton@dlapiper.com

8 EDWARD S. WARDELL, ESQ.
9 Kelley, Wardell, Craig, Annin &
10 Baxter, LLP
11 41 Grove Street
12 Haddonfield, NJ 08033
13 (856) 795-2220
14 Email: Ewardell@kwclawyers.com

15 Audio Operator:

16 Transcription Service: KING TRANSCRIPTION SERVICES
17 65 Willowbrook Boulevard
18 Wayne, New Jersey 07470
19 (973) 237-6080

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1 | (Commencement of proceedings at 10:32 a.m.)

2 |
3 | THE COURT: Good morning. We're here in Glen Ridge
4 | versus Horizon. Could I have appearances, please?

5 | MR. NAGEL: Good morning, Judge, for the plaintiff,
6 | Bruce Nagel, Nagel Rice, and cocounsel with Neil Prupis
7 | Lampf, Lipkind, class counsel. To my left is Charlie
8 | Gormalley, counsel to a number of class members.

9 | THE COURT: Okay. Good morning, everyone.

10 | MR. PENDLETON: Good morning, Judge, John
11 | Pendleton, DLA Piper on behalf of the defendant Horizon.

12 | MR. WARDELL: And Edward S. Wardell for Horizon.

13 | THE COURT: And in the courtroom with you?

14 | MR. PENDLETON: Ms. Sherry --

15 | THE COURT: Okay.

16 | MR. PENDLETON: -- class counsel for Horizon.

17 | THE COURT: Welcome back.

18 | MR. PENDLETON: And Jonathon Reese [phonetic], an
19 | employee of Horizon, who's involved in settlement
20 | negotiations with class members.

21 | THE COURT: Okay.

22 | MR. PENDLETON: --

23 | THE COURT: Good morning.

24 | MR. PENDLETON: -- agreements.

25 | THE COURT: Okay. I understand that there's been

1 some issues that have arisen and may preclude us going
2 forward on Thursday.

3 MR. PENDLETON: Well, Judge, as I advised
4 Your Honor yesterday, we have a fairness hearing scheduled in
5 this matter for Thursday, about 48 hours from right now. And
6 at this point, we have approximately 60 percent of the class
7 members having opted out of the settlement agreement.

8 Plaintiffs' counsel and Mr. Gormalley have been in
9 discussions with a number of the centers. Horizon has also
10 been in discussions with some of the centers about becoming
11 in-network providers. And that number may go down.

12 Plaintiffs' counsel believes it will go down.

13 But we're substantially above the 10 percent, as
14 Your Honor will recall, that is set forth in the agreement.
15 And if the number is above 10 percent, Horizon has the option
16 to void or terminate the settlement agreement.

17 We have extended the fairness hearing a few times
18 with court orders signed by Your Honor. But at this point, I
19 think we need to have an explanation of what the plaintiffs'
20 game plan is and whether or not they foresee a significant
21 reduction in the opt-out -- revocation of the opt-outs so
22 that we have more people participate in the agreement.
23 Otherwise, even if Horizon wanted to proceed, I doubt
24 Your Honor would be in a position to approve such a
25 settlement, if we've got a 50 or 40 percent of the class

1 opting out.

2 So I -- I have requested with the consent of all
3 the attorneys that we meet with Your Honor today to discuss
4 the status of the matter.

5 THE COURT: Okay.

6 Plaintiffs' counsel want to be heard?

7 MR. NAGEL: Judge, we -- we have a situation,
8 obviously, which was put into place by virtue of a -- what we
9 considered as class counsel an unreasonable term, which was
10 insisted on by Horizon, which was the negative clawback.

11 Mr. Gormalley --

12 THE COURT: That was part of the preliminary
13 approval.

14 MR. NAGEL: That was part of the preliminary
15 approval.

16 THE COURT: And I understand that that has been --
17 that is no longer part of the settlement.

18 MR. NAGEL: That's right.

19 THE COURT: There's no negative clawbacks, so
20 that's resolved. So why do we still 60 percent opting out?

21 MR. NAGEL: What happened is as a result of the
22 negative clawback, we have a major group of opt-outs. So now
23 what we're trying to do is undo that. We believe that there
24 will be a significant number of class members opting back
25 into the deal or revoking their opt-outs, but that cannot be

1 done in a week or two. And the reason is this: What Horizon
2 has done and very strategically and very smartly, they've
3 used the settlement to corral the class members into
4 in-network deals. And as part of the in-network
5 negotiations, which are now going on with probably 25 to 30
6 percent of the opt-outs, they're requiring them to opt back
7 in, which is what they're obligated to do under the terms of
8 the settlement agreement. They must encourage all class
9 members to go along with the deal.

10 We believe that that series of negotiations needs
11 to run its course. We're not going to know whether they're
12 going to sign these in-network deals tomorrow, the next day,
13 or the next week. We also are working with the opt-outs
14 directly, those that are not going in network, in order to
15 explain to them, why it's to their benefit to come back --

16 THE COURT: What percentage of the 60 percent are
17 going in network?

18 MR. NAGEL: We think in the neighborhood of 25 to
19 30 percent of it.

20 MR. PENDLETON: I think that's -- that's very high,
21 Judge. And the point I'll make is last week the plaintiffs
22 raised that this was an issue. Mr. Wardell sent a letter to
23 them indicating -- so that they could pass it along to all
24 the class members, which they told us they were satisfied
25 with, which said that Horizon does not view that the network

1 discussions as having any involvement with their decision to
2 opt back in. In fact, if anybody comes in network, we
3 require them to opt back into the settlement. We have
4 required that. We'll continue to require that.

5 The difference between the centers that we're
6 currently in negotiations with and the 60 percent is
7 approximately maybe 10 percent. So it's still a significant
8 portion of the class that's remaining.

9 And I will just say in response to what Mr. Nagel
10 said, that we believe that we can conclude any and all
11 discussions about whether people are coming in network -- and
12 Mr. Reese can speak to this -- within the next two weeks at
13 the outside.

14 THE COURT: How many surgery centers are you
15 talking about? What's the universe?

16 MR. PENDLETON: How many more are you talking to
17 still, Jon?

18 MR. REESE: We're talking to at least a dozen.

19 THE COURT: How -- what's the universe of surgery
20 centers that are part of this class?

21 MR. PENDLETON: 145?

22 THE COURT: And do we know how many are definitely
23 in and are part of the settlement?

24 MR. PENDLETON: We know that right now, two-thirds
25 of the 145 are in opt-out status, so one-third of the 145 or

1 approximately 50, Judge, are in the settlement.

2 THE COURT: Okay.

3 MR. NAGEL: I would think that the two-week -- the
4 two-week timeline outlined by Mr. Pendleton is probably
5 the -- the drop-dead date. I would think if we don't have --
6 if we don't have the opt backs -- if we don't have the class
7 members willing to go along with the deal, significantly less
8 within two weeks, I think the deal is going to be terminated.

9 THE COURT: Have they raised any issues about the
10 attorneys' fees, because I know when we had Riker involved
11 early on, and -- two months ago before preliminary hearing,
12 that that was an issue. Have any of them expressed to you
13 concern about attorneys' fees?

14 MR. NAGEL: Not that I've heard, and there's not
15 been a single objection. The only thing has been is
16 opt-outs; no objectors.

17 So I would think that the two weeks that
18 Mr. Pendleton outlined in terms of when he's going to get his
19 deals done, that's -- that's a deadline I think we can live
20 with. And I would think within two weeks, we're either going
21 to have a deal or we're not going to have a deal.

22 As of now, it's clear that there's no deal.

23 MR. PENDLETON: Judge, I would just say -- and,
24 again, Mr. Reese can speak to this because he and another
25 gentleman at Horizon are the principals involved in all of

1 these negotiations -- a lot of the centers have expressed --
2 called Horizon on their own and expressed significant concern
3 about the counsel fees. How many, it's not a significant
4 majority or anything of the class, but the people that
5 Mr. Reese and Mr. Simeses [phonetic], and the other person
6 have been speaking to, have been very concerned about that
7 and have been motivated to call Horizon and not deal with
8 plaintiffs' counsel or Mr. Gormalley for that reason and that
9 reason alone.

10 THE COURT: And how -- who is -- Mr. Gormalley, who
11 are you representing?

12 MR. GORMALLEY: There's about 30 centers we've
13 entered an appearance for, Your Honor.

14 THE COURT: And so you represent them independently
15 of Mr. Nagel?

16 MR. GORMALLEY: Correct, Your Honor.

17 THE COURT: And what about the surgery center that
18 Riker Danzig represented? Are they still in -- involved?

19 MR. NAGEL: They're in.

20 MR. GORMALLEY: They went in network.

21 MR. NAGEL: And they did not opt out.

22 MR. GORMALLEY: Judge, I would address the
23 attorneys' fees issue as well because what -- what we've --
24 we're aware that network discussions are ongoing. And the
25 way Horizon has been negotiating in-network discussion with

1 somebody that's opted out is requiring them to opt in and
2 then engaging in discussion, which basically immunizes the
3 class member from the impact of attorneys' fees, and by that,
4 I mean Horizon is requiring the class member to assign all
5 the benefits of being a class member to Horizon in return for
6 a payment from Horizon to come in network. And while that's
7 not directly an objection to attorneys' fees, a class member
8 objecting to attorneys' fees can basically have a network
9 discussion with Horizon and not pay attorneys' fees under
10 this class, doesn't impact on the payments coming to the
11 class --

12 THE COURT: Well, here's the concern I have. First
13 of all, let me just make something very clear: If there's
14 not -- I will not final -- I will not approve the class
15 unless you're very close to the hundred percent. There has
16 to be at least 90. I -- you know, this is a tenuous
17 settlement agreement, and I'll wait and see, but if there's
18 40 or 50 percent or even 30 percent that are opting out, I
19 will have great reservations about approving this as a class.
20 I want everyone to know that. I've said that all along,
21 number one.

22 Number two, none of this is news to me. We were
23 here two months ago, and it was explained to me that class
24 members who go in network, would not be responsible for that
25 payment of attorneys' fees going forward. And that's always

1 been the deal, and it's always been my concern that the
2 smaller the class or the smaller the people that go in
3 network, the smaller -- more people will share the burden of
4 attorneys' fees. And that's a concern.

5 So I'm not sure where this is headed. But I
6 want -- we worked very hard on on the one hand. On the other
7 hand, I'm here to make sure it's fair and that everyone's
8 rights are protected. And I have -- I'm frankly surprised
9 that there's this much resistance and 60 percent of the class
10 is out. That's concerning to me. It's -- it's not something
11 that I -- you know, I take lightly. I was under the
12 impression -- I would have expected at least 10 percent,
13 maybe a little bit more, would opt out. But to have a 60
14 percent opt-out suggests to me that there's a problem with
15 this settlement that we're trying to put together. So -- and
16 I want to know and I will -- and I -- I'm not sure how we're
17 going to go forward, but I may want to -- I may want some of
18 the representative client -- I'm hoping that more will come
19 for the final hearing on the date I give you, because I want
20 to make sure that everyone is -- who's in is in and there's
21 not going to be problems post -- post approval, because this
22 is unlike -- and I've said this all along -- unlike many
23 set- -- many class actions where you may -- at the end of the
24 day you get a rebate check -- a very small rebate check or an
25 new tire for your car or a new washing machine, and although

1 all of those are all significant events, this is -- this case
2 involves the livelihood and the income of doctors. And
3 that's big. That is not -- you know, we -- if you don't get
4 the -- the \$3 rebate check or the new tire, it's not going to
5 be life-altering. This is life-altering for professionals.

6 We're lawyers, we're professionals. If there was a
7 class action that would affect our income going forward for a
8 number of years, we would be very concerned about it.

9 And there's enough worries in health care reform
10 generally for doctors and medical professionals that, you
11 know, this affects the livelihood not only of doctors and
12 their families, but of all support staff that work at these
13 surgery centers. So this is a big one. And I don't -- I
14 take it very seriously that I want to make sure that everyone
15 knows what they're buying into. The preliminary approval --
16 you know, the papers in support of it were complicated. It's
17 not as simple as you'll get a rebate check, you can -- you'll
18 get your television repaired, you will get a new washing
19 machine filter. It's not that simple. It's very
20 complicated.

21 And I will not rush it. And I know -- I know
22 there's urgency here for Horizon. But I'm not going to rush
23 it. I want to make sure everyone there's -- that this class
24 is fully informed, they're comfortable with the deal, they're
25 comfortable with the attorneys' fees, and they make a -- they

1 make an intelligent decision to participate in the
2 settlement. And if they don't, then we'll be back to square
3 one, which is I will not approve it and we'll be back to a
4 lawsuit.

5 So I just want you to know where I'm coming from,
6 because to me these are not -- the terms of the settlement
7 are not a surprise. The fact there was going to be
8 in-network deals are not a surprise. The fact that there's
9 an attorneys' fees changes on whether you're in -- in or out
10 of network isn't a surprise. Nothing's really a surprise.

11 But what is a surprise to me in February is that we
12 have 60 percent of the class opting out. We originally were
13 to have this hearing, I believe in December. So it's six
14 weeks later and we're still not there. So I will -- I'm
15 happy to give you one more chance to see if we can make it
16 work, but I think prior to the date I give you, I want to
17 have another conference with counsel, because I don't want to
18 walk into a mine field the day of the approval hearing and
19 have an approval hearing if it's not feasible.

20 Mr. Prupis?

21 MR. PRUPIS: Your Honor, I would like to basically
22 describe to you the process. When we talk to the centers, I
23 also talk to the attorneys for the centers; every one of
24 these centers has an individual attorney.

25 THE COURT: On top of Mr. Gormalley?

1 MR. PRUPIS: Yes. Oh yes. Oh yes. Sometimes I
2 talk to more than one attorney with respect to a center. And
3 I have to describe the entire settlement, and I have to talk
4 about the economics on a going-forward basis. And we talk
5 about whether it makes sense to go in network or not go in
6 network. The actual process of communicating with these
7 centers has been extremely prolonged. For example,
8 yesterday -- and a lot of these centers control, like, maybe
9 seven centers by one person. We have a couple of large
10 companies that manage these centers. So one management
11 company's involved with seven centers or six centers. So
12 even though we talked about maybe 60 centers not being
13 involved, 20 or 30 of them are controlled by two or three
14 people. So there is tremendous amount of conversation. When
15 we have conversation with those centers, then the centers'
16 people have to go back to the doctor-owners for a vote --

17 THE COURT: I hear you. I -- I hear you. I don't
18 dispute that.

19 But what my point is more fundamental. It's
20 complicated. It's not simple. The fact that you -- they
21 have lawyers -- I'm not even sure what the role of
22 Mr. Gormalley is. Mr. Gormalley want- -- he's not class
23 counsel that I've approved. I would have class counsel
24 Mr. Prupis and Mr. Nagel only, their firms.

25 | Are you -- you're not counsel of record,

1 Mr. Gormalley. I'm letting you speak today as a courtesy.

2 MR. GORMALLEY: I've appeared for about 30 centers.

3 I filed notice of appearance, Judge.

4 THE COURT: What does that mean? I mean this is
5 a --

6 MR. GORMALLEY: At the time I filed it, Judge, I
7 didn't know whether I was filing for objectors or opt-outs --

8 THE COURT: Right. But why not -- let's talk about
9 it. We're lawyers. Let's talk about it.

10 This is a class action. This is not a multi-party
11 action. It's a class action. There's been a preliminary
12 approval. And I've appointed Nagel Rice and Mr. Prupis's
13 firm as class counsel.

14 MR. GORMALLEY: Correct, Judge. And I got involved
15 in negotiating improvements to the originally approved
16 settlement that Your Honor then amended the deal and --

17 THE COURT: Right, but --

18 MR. GORMALLEY: Since then we've been try- --

19 THE COURT: Right. But this is for counsel -- I'm
20 letting you to speak today as a courtesy and because you're
21 sitting with Mr. Prupis and Mr. Nagel. But you're not
22 part -- you will not share in the attorneys' fees, as I know
23 it, that I've approved because there's no mechanism for that.
24 You haven't intervened as class -- you haven't -- motion to
25 file an appearance as class counsel before me. I'm just

1 hearing from Mr. Prupis that in addition to you, they --
2 everyone has their own lawyers, so we have --

3 MR. GORMALLEY: Judge -- Judge -- I think the
4 amended settlement agreement contemplates I will be filing a
5 fee application with respect to improvements that have been
6 made to the substantive portions of the settlement after it
7 was originally approved by Your Honor. That's in the amended
8 proposal. Only to come out of class counsel's fee, not an
9 additional fee to the class. I have been actively involved
10 in negotiating improvements to the settlement as well as
11 communicating to the class whether or not they should be
12 opting into the settlement or not. That's been my role. I'm
13 here only because I was asked to be here today.

14 THE COURT: So Mr. Prupis said they have you and
15 they have other private counsel as well?

16 MR. GORMALLEY: Judge -- Mr. Prupis --

17 THE COURT: I mean it sounds -- it sounds very odd
18 to me.

19 MR. GORMALLEY: It's somewhat complicated, Judge.
20 You have management companies that manage the day-to-day
21 affairs of operating surgery centers. I got involved in
22 representing the ownership interests of surgery centers.
23 Those owners ask me whether or not they should opt in. The
24 management company also weighs in on that issue, not only for
25 that center, but other centers. The management company has

1 separate counsel as well. All of these individuals have --
2 and the physicians and the practices themselves have
3 different counsel. So there's -- it's not all like this, but
4 many of them have multiple layers of attorneys that get
5 involved in the discussion. It's not a simple arrangement.

6 MR. PENDLETON: Judge, the amended agreement that
7 Your Honor did approve does talk about Mr. Gormalley's firm
8 making an application for fees not to exceed \$500,000, which
9 comes out of any award that Your Honor might approve for
10 class counsel. It's not in addition to; it's part of. And
11 that was in the amended order.

12 I think, Judge, we're looking at -- what we need to
13 look at is an extension, one more extension, as Your Honor
14 indicated, and two weeks from the Thursday date would be
15 Thursday the 24th.

16 THE COURT: I won't be here that week. So it will
17 be the next week.

18 MR. PENDLETON: Could we do it on Monday the 28th?

19 MR. NAGEL: I'm coming back from vacation --

20 THE COURT: No. I'm coming back from vacation. It
21 doesn't work for me. It'll be later in that week. It's a
22 busy week for me. I want to have a status conference with
23 the lawyers first. So I'm sorry, but I can't do it that day,
24 and I don't think it's wise for me to come back from vacation
25 with mail and problems and potential letters and opt-outs

1 and -- and it wouldn't be fair to the class members to do
2 that. So I'm not going to do it. So what I'd like to do
3 first is that week back -- I'm also on criminal duty that
4 week, which is not a good thing. And so what I'd like to do
5 is talk to you that first week. We'll have a phone
6 conference at 3:30 on March 1st. And I'm going to have to
7 move some things around for the following -- so I want to
8 keep the whole morning open for this hearing. We will have
9 it on March 9th at 10 o'clock.

10 MR. PENDLETON: And just so that we're clear, we've
11 done this each time as we've extended these deadlines,
12 Your Honor, all of the deadlines from the original order will
13 be summarily extended, and I think the implementation date,
14 as I've discussed with class counsel previously, we need to
15 implement any settlement that might be approved on the 1st or
16 the 15th of a month, so we're talking about March 9th, we're
17 talking about an implementation date that'd probably make
18 sense would be April 1st, so that Horizon has a couple of
19 weeks to -- to gear up to do that --

20 THE COURT: Is that -- is it better to have it the
21 following week or that -- the March 9th date is okay?

22 MR. NAGEL: Yeah, that may present a problem,
23 Judge, because, again, what's -- what's happening here is
24 that we're not -- while they are implementing it later,
25 they're not extending the three-year period we negotiated, so

1 | on the implementation date, we're going to have to talk to
2 | Mr. Pendleton and counsel --

3 | MR. PENDLETON: Yeah, I -- she already just told
4 | me, we can do it on March 15th -- the thing, so that's -- I
5 | was thinking that might be a little tight, but apparently we
6 | can do that. So if we have the hearing on March 9th -- did
7 | you say at 10 o'clock in the morning, Your Honor?

8 | THE COURT: Yes. What date did you -- we'll make
9 | it 11, so -- we could talk to counsel before we do anything,
10 | if necessary.

11 | MALE SPEAKER: Okay.

12 | THE COURT: So the -- get here a little earlier.

13 | MR. PENDLETON: The implementation --

14 | THE COURT: Do you want it the 9th, or do you want
15 | the 15th?

16 | MR. PENDLETON: No, no, the hearing on the 9th.

17 | THE COURT: Okay.

18 | MR. PENDLETON: And then the settlement would be
19 | implemented on March 15th.

20 | THE COURT: Okay.

21 | MR. NAGEL: That's an open issue, Judge. That's an
22 | open issue, because, again, if you push the implementation
23 | date back, we need to push the three years back. Horizon has
24 | not agreed to that.

25 | THE COURT: Right.

1 MR. NAGEL: So --

2 THE COURT: But alternative is we can't go -- if we
3 were to go forward Thursday, I would not prove it and we'd be
4 back to square one with no settlement.

5 MR. NAGEL: I hear that.

6 THE COURT: So I mean we're pushing it back at
7 plaintiffs' counsel's request.

8 MR. NAGEL: We're pushing it back at every -- a
9 joint -- it's a joint request.

10 THE COURT: Well, it's a joint request because it
11 can't -- I'll go forward with Thursday. I'm ready. You want
12 to go forward with Thursday?

13 MR. NAGEL: There's no need to go forward --

14 THE COURT: Because there'll be no hearing --
15 there'll be a -- on Thursday there will be a finding from me
16 that there'll be no settlement. I will not approve a class
17 of 40 percent.

18 MALE SPEAKER: I agree.

19 THE COURT: So that's the problem. And you can try
20 to work it out, but this is -- this is it. If -- if -- I
21 want to make something very clear. This is now three months
22 past December. The core terms are exactly what we talked
23 about in November and December. If it -- if there's not 90
24 percent on March 9th, this settlement -- we'll go back to
25 square one. We'll go back to discovery, and we'll go back to

1 motion practice. That's what it'll be.

2 MR. NAGEL: I would just ask that Your Honor keep
3 an open mind with the 90 percent issue, because Horizon
4 indicated that they're willing to go forward if it's in
5 excess of 10 percent. So I'd ask Your Honor to just leave
6 the --

7 THE COURT: We'll see where -- we'll see how far it
8 is, how -- what the -- and I'm not going to draw a line in
9 the sand. I want to know which surgery centers there are. I
10 want to know -- you could -- they're not -- no one is here
11 today, but I would like to know, if possible, for whatever
12 percentage of folks are opting out, why. I want to know why.
13 Is it -- is it the terms? Is it the counsel fees? Is it
14 they're going -- you know -- what -- I want to know why,
15 because I made preliminary findings that this was a great
16 deal going forward for class members, that they had a great
17 benefit in terms of not only -- not only recouping prior
18 losses but having a more favorable rate going forward. And
19 since -- the only thing that's changed since the preliminary
20 approval is that -- that for past amounts due, Horizon will
21 no longer be recouping. So if anything, the settlement has
22 become more favorable to the class members than the one I
23 approved. I want to know why. So my ad- -- my
24 recommendation is if there is more than 10 percent that are
25 not -- that are opting out of this class, I need to know why,

1 if you want me to approve it. I'm -- like live witnesses why
2 or sworn affidavits why, either by their -- you know, I'm
3 glad to hear from Mr. Prupis that everyone seems to be
4 represented by counsel, so we're not going to have -- we
5 certainly have the ability for class counsel to ask why
6 through counsel and to present those findings to the Court
7 because I need to know why, if I'm going to go below the 10
8 percent, is this an anomaly, it's just a -- I don't want to
9 deal with Horizon anymore. I mean, I need to know why.

10 Okay?

11 MR. PENDLETON: Okay. We'll let Your Honor know.

12 THE COURT: Anything else?

13 UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

14 THE COURT: See you March 9th. Thank you.

15 FEMALE SPEAKER: All rise.

16 (Conclusion of proceedings at 10:56 a.m.)

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11 I further certify that I am in no way related to any of
12 the parties hereto nor am I in any way interested in the
13 outcome hereof.

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S/ *Sara L. Kern*

February 15, 2011

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Sara L. Kern, CET**D-338
King Transcription Services
65 Willowbrook Boulevard
Wayne, NJ 07470
(973) 237-6080

Date